Supreme Court, U.S.
FILED
FEB 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF

WILLIAM T. COLEMAN, JR.
Counsel of Record
DONALD T. BLISS
JOHN H. BEISNER
JAMES P. NEHF
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

CASES Page

Alaska Airlines, Inc. v. Donovan, 594 F. Supp. 92 (D.D.C. 1984) 2, 3, 4

Exxon Corp. v. Department of Energy, 744 F.2d 98 (Temp. Emer. Ct. App.), *cert. denied*, 105 S. Ct. 576 (1984) 2

Gulf Oil Corp. v. Dyke, 734 F.2d 797 (Temp. Emer. Ct. App.), *cert. denied*, 105 S. Ct. 173 (1984) 2

Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) 1, 2

STATUTES

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C. app. (1982)) 3, 4

Interstate Commerce Act, 49 U.S.C. § 1378 (1982) .. 5

LEGISLATIVE MATERIALS

S. 2493, 95th Cong., 2d Sess. (1978) 4

H.R. 12611, 95th Cong., 2d Sess. (1978) 5

S. Rep. No. 631, 95th Cong., 2d Sess. (1978) 3

124 Cong. Rec. (daily ed. Apr. 19, 1978) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-920

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF

---

1. Far from "faithfully appl[ying]" the principles of severability set forth in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), *see* Opposition Brief of Secretary of Labor at 9 ("Op. Br."), this decision represents a major change in the standard that previously has been applied uniformly to determine whether an unconstitutional provision can be severed from the remainder of a statute. Although the court of appeals did introduce its severability analysis by quoting the *Chadha* standard—*i.e.*, a statute is not severable if "it is evident that the Legislature would not have enacted those provisions which are within its power, independent of that which is not," 462 U.S. at 931-32, *see* Pet. App. at 16a—the court immediately thereafter abandoned *Chadha*, embracing a completely different approach and strictly applying it for the remainder of its analysis. On no fewer than four occasions, the court announced

that its test was whether Congress preferred the severed statute to no employee protection program at all, *see* Pet. App. at 19a, 25a, 26a and 28a, with no discussion of how this issue related to the *Chadha* benchmark. Thus, unlike *Exxon Corp. v. Department of Energy*, 744 F.2d 98 (Temp. Emer. Ct. App.), *cert. denied*, 105 S. Ct. 576 (1984), and *Gulf Oil Corp. v. Dyke*, 734 F.2d 797 (Temp. Emer. Ct. App.), *cert. denied*, 105 S. Ct. 173 (1984), *see* Op. Br. at 11, where the Temporary Emergency Court of Appeals stated a similar severability test as an *alternative* rationale after applying *Chadha*, this case squarely presents the question whether a court can sustain a statute simply because it concludes that the law without the unconstitutional provision is better than no law at all.

2. The district court, applying traditional severability analysis, invalidated Section 43 because the language, purpose and legislative history of the employee protection program and the entire Airline Deregulation Act demonstrated convincingly that "Congress would not have enacted § 43 in its present form without [a veto] provision." *Alaska Airlines, Inc. v. Donovan*, 594 F. Supp. 92, 95 (D.D.C. 1984). The Secretary of Labor readily concedes the critical point that the severed statute is not what Congress contemplated, Op. Br. at 11, but asserts that the statute should nevertheless remain in force because it is better than "no statute at all." *Id.* This test for severability, while perhaps more convenient to apply because it turns on the "importan[ce]" of the legislation, Op. Br. at 8, rather than an inquiry into whether Congress would have enacted "those provisions which are within its power," 462 U.S. at 932, creates a dangerous precedent because, as this case demonstrates, it permits a court to sustain part of a statute in a form that Congress would never have enacted independent of the unconstitutional provision.[1]

---

[1] The court of appeals also employed the shortcut of a presumption that a statute is severable if the remaining provisions are

3. The outcome of this case turned entirely on the severability standard the court adopted. If the court had considered whether Congress would have enacted Section 43 in the particular form it did without retaining a veto, petitioners would have prevailed. The legislative history of the Deregulation Act makes clear that Congress was not in a position to foresee the nature or cost of the employee protection program or the problems that it might cause in a deregulated environment. *See* 594 F. Supp. at 95. Congress included the veto provision in Section 43 (and nowhere else in the Deregulation Act) because given its commitment to deregulation and its uncertainty about the effect of the Act on employment, it would not unequivocally authorize the Department of Labor ("DOL"), an agency with little experience with the airline industry or with the congressional aviation committees that drafted the Deregulation Act, to create an expansive regulatory program without preserving Congress' ability easily and quickly to nullify any regulatory excesses that could undermine the very purpose of the legislation. *See* S. Rep. No. 631, 95th Cong., 2d Sess. 113 (1978). The Deregulation Act conferred more than twenty-five delegations of authority, many of which created programs at least as "regulatory" as Section 43,[2]

"operative as law." Pet. App. at 18a. But whether a statute is "operative" without the invalid provision is not particularly enlightening in the severability analysis of a statute containing a legislative veto because a veto is by definition the capacity to negate the operation of an authority delegation, and the removal of the veto obviously does not interfere with the initial functioning of the delegation.

[2] The court of appeals erroneously assumed that Section 43 was the only "regulatory provision" in an otherwise "deregulatory statute." *See* Pet. App. at 25a. Among the other regulatory delegations were: the Civil Aeronautics Board's ("CAB") duty to implement a program ensuring adequate air service to small communities (Pub. L. No. 95-504, 92 Stat. 1705, § 33 (92 Stat. 1732-36)); the CAB's authority to oversee and issue rules modifying a controversial automatic entry program (*id.* § 12, 92 Stat. 1716-18); the Federal Avia-

but only the Section 43 delegation to DOL was subject to a legislative veto. Moreover, while the Conference Committee was strengthening Congress' oversight responsibilities with respect to the Section 43 delegation to DOL, it deleted completely its veto capability over the "automatic entry program"—a highly controversial program that gave the Civil Aeronautics Board ("CAB") wide discretion over one of the most important features of the Deregulation Act.[3] These facts, coupled with the observation that the "elaborate" veto provision is unique among the nearly two hundred statutory legislative veto provisions enacted by Congress, 594 F. Supp. at 95, were critical in the district court's determination that Congress would not have granted such a broad delegation to the Secretary of Labor without retaining a veto power over the program he developed. *Id.* The significance of this evidence, however, was lost when the court of appeals focused on the "importance" Congress placed on creating *some* type of employee protection program, *see* Pet. App. at 23, instead of determining whether Congress would have enacted this *particular* type of program without the legislative veto as a check on DOL's program. *See* Pet. App. at 23a-28a.

4. Respondents' opposition brief completely mischaracterizes the significance of the Conference compromise.

---

tion Administration's duty to establish certain aircraft safety standards (*id.* §§ 5 and 33, 92 Stat. 1709, 1738-39); and the CAB's obligation, under revised procedures, to consider applications for route certification (*id.* §§ 7 and 8, 92 Stat. 1711-12).

[3] The automatic entry program allowed airlines to add and subtract a limited number of routes from their current schedules without CAB approval, and the Senate bill gave the CAB an "emergency modification" power to intervene and modify the program, subject to a sixty legislative day one-house veto provision. S. 2493, 95th Cong., 2d Sess. § 5 (1978). While the delegation to the CAB was enacted, the legislative veto provision was deleted in Conference, leaving Section 43 with the only legislative veto in the entire Act.

The important point is not that one house of Congress had proposed a "stronger" employee protection plan than the other, *see* Op. Br. at 8, but that the Senate proposal was a radical departure—both in the breadth of coverage and the extent of the benefits offered—from the types of employee protection plans Congress had enacted before. The House proposal, which did not contain a legislative veto, was long established in other regulated transportation industries and involved attaching case-specific labor protections as conditions on the receipt of some government benefit or regulatory approval. H.R. 12611, 95th Cong., 2d Sess. § 32 (1978). In fact, the House bill contained an employee protection authorization similar to that which the CAB had already been relying on for years when approving individual mergers and consolidations in the airline industry under the Interstate Commerce Act, 49 U.S.C. § 1378 (1982). By contrast, the duty to hire and compensation schemes incorporated in the Senate bill, which were substantially enacted as Section 43, applied industrywide, were not tied to specific government or carrier actions, and constituted a new and controversial intrusion into the labor market. The only non-controversial element of the Senate approach was the veto provision, which was included in the Committee bill and every floor amendment. *See* 124 Cong. Rec. S5876 (daily ed. Apr. 19, 1978) (amendment by Sen. Zorinsky); *id.* at S5882 (amendment by Sen. Danforth). The Conference compromise was significant because it graphically demonstrated Congress' reluctance to go forward with an untested form of employee protection on such a broad scale without a significant check on the program developed by the Secretary of Labor. The Conference manifested that concern by not only retaining a legislative veto but actually strengthening congressional involvement by adding a thirty-day report and wait requirement.

For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.
Counsel of Record
DONALD T. BLISS
JOHN H. BEISNER
JAMES P. NEHF
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

February 25, 1986